(3)

No. 90-96

Supreme Court, U.S.
FILED
NOV 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK A. SIEGERT,
Petitioner

v.

H. MELVYN GILLEY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF THE NATIONAL CAPITAL AREA SUPPORTING PETITIONER

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

ARTHUR B. SPITZER
ACLU FUND OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DAVID H. REMES
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5212

DAVID RUDOVSKY
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-3087

Counsel for Amici Curiae

November 29, 1990

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. GILLEY'S OBJECTIVE CONDUCT, IRRESPECTIVE OF HIS MOTIVATION, VIOLATED "CLEARLY ESTABLISHED" LAW	8
II. SIEGERT'S CIRCUMSTANTIAL PROOF OF GILLEY'S BAD FAITH WAS SUFFICIENT TO AVOID DISMISSAL OF HIS CLAIM PRIOR TO DISCOVERY	11
A. Unconstitutional Motivation May Be Established by Circumstantial Evidence	11
B. Limited Discovery Was Justified To Test the Strength of Siegert's Claim	14
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950) 11
Anderson v. *Creighton*, 483 U.S. 635 (1987) ..... *passim*
Bartel v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) ..5, 9, 10, 11
Bell v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1985) 14
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) ..... *passim*
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 7
Collinson v. *Gott*, 895 F.2d 994 (4th Cir. 1990) 13
Doe v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) 5, 9, 10, 11
Fludd v. *U.S. Secret Service*, 771 F.2d 549 (D.C. Cir. 1985) 2
Harte-Hanks Communications, Inc. v. *Connaughton*, 109 S. Ct. 2678 (1989) 12
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) ..... *passim*
Herbert v. *Lando*, 441 U.S. 153 (1979) 12
Hobson v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) 2, 14
Holland v. *United States*, 348 U.S. 121 (1954) 11
Melton v. *City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989) 13
Michalic v. *Cleveland Tankers, Inc.*, 364 U.S. 325 (1960) 11, 14
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 15
Nixon v. *Fitzgerald*, 457 U.S. 731 (1982) 2
Pueblo Neighborhood Health Centers v. *Losavio*, 847 F.2d 642 (10th Cir. 1988) 13
Richardson v. *Chevrefils*, 552 A.2d 89 (N.H. 1988) .. 10
Rogers v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957) 11
Springer v. *Seaman*, 821 F.2d 871 (1st Cir. 1987) .. 13
TSC Industries, Inc. v. *Northwestern, Inc.*, 426 U.S. 438 (1976) 11
The Robert Edwards, 19 U.S. (6 Wheat.) 187 (1821) 11

TABLE OF AUTHORITIES—Continued

Page

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 12
Washington v. *Davis*, 426 U.S. 229 (1978) 7

Court Rules:

Sup. Ct. R. 24.1 (a) 7

Miscellaneous:

R. Smolla, *Law of Defamation* § 8.08[2][b] (1990) 10
Wright, *Federal Practice and Procedure—Criminal 2d* § 411, p. 481 (1982) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-96

FREDERICK A. SIEGERT,
Petitioner

v.

H. MELVYN GILLEY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF THE NATIONAL CAPITAL AREA SUPPORTING PETITIONER

INTEREST OF AMICI[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 270,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all American. Towards that goal, the ACLU has frequently represented individuals in civil actions seeking damages against government officials who have violated their constitutional rights. The

---

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

substantive and procedural parameters of official immunity from such liability is thus of direct concern to the ACLU and its clients.

The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials where qualified immunity is interposed as a defense to asserted violations of constitutional rights. Indeed, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); and *Fludd* v. *U.S. Secret Service*, 771 F.2d 549 (D.C. Cir. 1985), were ACLU/NCA cases.

STATEMENT

1. Petitioner Siegert was a psychologist employed by the federal government at St. Elizabeths Hospital from November 1979 until October 1985. He resigned in October 1985, mainly because of personal and professional differences with respondent Gilley, who became Siegert's supervisor in January 1985.[2] Before Gilley became Siegert's supervisor, Siegert received exemplary job performance ratings from his supervisors. His performance was adjudged to be "outstanding" in 1984.

Siegert began looking for another job soon after Gilley became his supervisor. In May 1985, the Army informed Siegert that he would be considered

[2] Pet. App. 33a. The professional differences centered around Gilley's attempts to change some aspects of St. Elizabeths' behavior modification program for the mentally retarded. The personal differences centered around Siegert's extensive medical leave during the spring of 1985 as a result of injuries he sustained from a patient.

for vacancies in European posts as a clinical psychologist. In late August 1985, Siegert signed a 36-month contract with the Army hospital in Bremerhaven, West Germany, to work in the area of his expertise, child development and behavior therapy.

In early September 1985, Siegert learned that he was going to be terminated by St. Elizabeths, at least in part because of his conflicts with Gilley. Pet. App. 33a. Siegert met with officials at the hospital and reached an agreement that if he resigned, a letter of removal would not appear in his personnel file. In reaching this agreement, Siegert sought to protect his future job prospects and his standing in his professional community.

In October 1985, Bremerhaven forwarded to St. Elizabeths a request form for information about Siegert. There followed a letter dated October 23, 1985, from Gilley to Lt. Col. Smith of Bremerhaven, in which Gilley accused Siegert of being inept, unethical and one of the least trustworthy individuals he had supervised during his thirteen years at St. Elizabeths.[3] As a result of this letter, Siegert was denied credentials for working with children at Bremerhaven and was relegated to library work.

In July 1986, because of his difficulty in obtaining credentials at Bremerhaven, Siegert sought a position as a clinical psychologist at the Army base in Stuttgart. Ultimately, Siegert was told that he was not wanted there because of what had been learned about him from Bremerhaven personnel. Siegert was unsuccessful in his attempts to overturn the Bremer-

[3] According to the District Court, this letter followed a conversation between Col. Smith and Gilley, initiated by Col. Smith. Pet. App. 34a.

haven credentialing decision administratively and was thus unable to practice there as a clinical psychologist in the area of his specialty or any other comparable area.

2. In November 1986, Siegert brought this action in the United States District Court for the District of Columbia. Siegert alleged that Gilley's statements were false and made in bad faith, depriving Siegert of liberty without due process in violation of the Fifth Amendment. Siegert sought damages from Gilley under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Gilley moved for dismissal or summary judgment based on his defense of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

In December 1987, the District Court denied Gilley's motion on the ground that the record was insufficiently developed. On its own motion, the court ordered discovery, limited to the taking of depositions from the parties and Col. Smith. The tenor of the court's subsequent opinion indicates that it believed Siegert's claims to be substantial and potentially meritorious. The court apparently sought to protect Gilley by testing Siegert's claims through discovery, rather than immediately ordering Gilley to face trial. *See* Pet. App. 52a.

In June 1988, in its opinion on Gilley's motion for reconsideration and stay, the District Court ruled that Siegert had alleged a violation of a constitutionally protected liberty interest that was clearly established in the case law at the time of Gilley's actions. The court provisionally rejected Gilley's qualified immunity defense, pending the completion of discovery.

In an opinion this February, the Court of Appeals reversed. Holding the District Court's decision on Gilley's qualified immunity defense to be appealable, the court construed Siegert's complaint as alleging two independent violations of due process—(1) Gilley's stigmatization of Siegert and its resulting impact on Siegert's employment prospects, irrespective of Gilley's motivation; and (2) Gilley's bad faith and malice in sending to Col. Smith a letter filled with accusations about Siegert that Gilley knew to be false.

As to the first claim, the court held that Gilley's objective conduct did not violate a "clearly established" right notwithstanding its decisions in *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), and *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984)—two cases that found constitutional violations on facts virtually indistinguishable from those presented here. As to the second claim, without deciding whether Gilley's bad faith motivation would suffice to make his actions a violation of Siegert's constitutional rights, the court held that the facts pleaded by Siegert with respect to Gilley's motivation were too "circumstantial" to survive a motion to dismiss.[4] It held that its prior decisions interpreting *Harlow* precluded the trial judge from ordering even limited discovery on the issue of Gilley's motivation prior to ruling on the motion for dismissal or summary judgment. "[D]iscovery is not to be allowed until plain-

[4] "[W]e find that the invalidating motivation has not been pleaded with the offer of noncircumstantial proof required to satisfy our heightened pleading standard." Pet. App. 17a. Gilley's brief in opposition to certiorari suggested otherwise, but it was the circumstantial nature of Siegert's case—not the conclusory nature of his allegations—that the court considered fatal to his claim. *See* Pet. App. 13a-14a, 19a.

tiff has alleged the existence of direct evidence of impermissible motive." Pet. App. 13a.

Judge Wald dissented from the panel's refusal to allow the limited discovery ordered by the District Court. Observing that "proof of the defendant's motive is peculiarly in the defendant's hands," Judge Wald noted the injustice of requiring a plaintiff to proffer direct evidence of the defendant's motive in order to survive a motion to dismiss, while at the same time precluding the plaintiff from taking limited discovery on the issue. Pet. App. 20a. She stated:

> "Narrowly tailored discovery, controlled in scope and duration by a trial judge sensitive to the problems of exposing officials to disruptive litigation, * * * allows worthy plaintiffs to mount reasonable challenges to otherwise impenetrable qualified immunity defenses. * * * Failure to provide any leeway for plaintiffs or trial judges, regardless of circumstances, to obtain evidence of illegal motives through limited discovery controlled by the trial judge is, in my view, not only unfair but unjustified by existing Supreme Court precedent." Pet. App. 22a, 24a.

SUMMARY OF ARGUMENT

The Court of Appeals committed two errors that place unfair and unjustifiable obstacles in the path of *Bivens* plaintiffs.

First, in ruling that Gilley's objective conduct did not violate a "clearly established" right, the court held, in effect, that official action will be protected by qualified immunity unless the very action in question has previously been held to be unlawful. By providing immunity in the absence of precedent on all fours

with the case at bar, the court's holding disregards the standard established in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and unreasonably restricts the availability of the *Bivens* remedy for violations of constitutional rights.[6]

Second, in holding that the claim based on Gilley's bad faith must be dismissed forthwith, the court arbitrarily and unfairly precluded reliance on circumstantial evidence to prove unconstitutional motivation, and improperly deprived the District Court of discovery as a tool for testing the strength of a *Bivens* plaintiff's claims prior to ruling on the qualified immunity defense. By demanding that a *Bivens* plaintiff proffer direct evidence of unconstitutional motivation, while prohibiting discovery unless the plaintiff is able to proffer direct evidence of such motivation beforehand, the court effectively has precluded *Bivens* claims in which the defendant's state of mind is an element. In so doing, the court undid the balance struck by this Court in *Harlow* between permitting vindication of constitutional rights and protecting government officials from harassing litigation and unwarranted liability.

---

[6] Because the Court of Appeals' disposition of this issue was plain error, this Court may consider it even though the issue was not raised by the question framed in the petition for certiorari. *See* Sup. Ct. R. 24.1(a); *Washington* v. *Davis*, 426 U.S. 229, 238 & nn.8-9 (1978); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 & n.15 (1981) (review despite absence of "plain error"). The issue certainly is within the scope of the question presented in Gilley's brief in opposition ("Whether the Court of Appeals correctly dismissed this *Bivens* action on grounds of qualified immunity.").

ARGUMENT

I. GILLEY'S OBJECTIVE CONDUCT, IRRESPECTIVE OF HIS MOTIVATION, VIOLATED "CLEARLY ESTABLISHED" LAW.

Under the doctrine of qualified immunity, government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), the Court explained the sense in which the right alleged to have been violated must have been "clearly establishd":

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citations omitted).

Anderson thus charted a deliberate course between the Scylla and Charybdis of overgeneralizing and overparticularizing the right in question. The Court of Appeals disregarded that direction. Although it steered clear of one extreme—identifying the right in question so abstractly as to defeat the goals of qualified immunity—the court fell into the other extreme, ruling (in effect) that Gilley's objective conduct did not violate any "clearly established" right of Siegert's because no case previously decided by the court involved absolutely identical facts. As the District Court concluded, however, the unlawfulness of Gilley's conduct in October 1985 should have been apparent under two cases decided by the Court of Appeals before the actions in question were taken. *See* Pet. App. 42a-47a.

In *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), the Court of Appeals held that a former Department of Justice attorney, discharged from her position amidst charges of unprofessional conduct and dishonesty, had asserted a constitutionally protected liberty interest because government action had both caused the loss of her job and stigmatized her. In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court similarly held that a former government air safety inspector, denied consideration for another position because of a defamatory letter written by his former supervisor, had identified a cognizable liberty interest the denial of which would violate due process.

The Court of Appeals agreed with the District Court that *Doe* and *Bartel* "illustrate circumstances in which a government official's stigmatizing comments will violate a former employee's protected liberty interest by effecting a change in his status vis-a-vis the government." Pet. App. 16a. Nevertheless, the court held that Gilley could not reasonably have known that his *precise* conduct was unlawful under these cases, because neither case involved the *precise* fact pattern presented by this case—stigmatizing allegations made in response to a request for a job reference from a prospective employer. Pet. App. 15a-16a. The court distinguished *Bartel* on the ground that the former supervisor in that case sent the defamatory letter on his own initiative and not in response to a solicitation for a job reference. Pet. App. 16a.

In support of this distinction, the court observed that under common law the qualified privilege for providing reports on former employees to prospective employers is "more likely" to be applicable when the report is requested rather than volunteered. Pet. App. 15a.[6] This contingency, however, does not make Siegert's due process right under *Doe* and *Bartel* any less "clearly established." At most, it provides Gilley with a possible further defense to Siegert's claim that his due process right was violated.

As Justice Souter observed not long ago in an opinion for the Supreme Court of New Hampshire, defendants in *Bivens* suits "can hardly demand that the precise actions in question must previously have been held to implicate procedural due process, lest the immunity become virtually plenary." *Richardson* v. *Chevrefils*, 552 A.2d 89, 93 (N.H. 1988).[7] Allowing

[6] The source cited by the court actually says that the presence or absence of a request is "merely one of the factors to be considered in determining whether the privilge applies." R. Smolla, *Law of Defamation* § 8.08[2][b] (1990).

[7] In *Chevrefils*, the plaintiff, who had been employed by the state as a social worker, sued a state welfare official under Section 1983 for listing him as a "sex abuser" in a central state registry, without notice or hearing, thereby barring him from employment as a social worker in any child care agency subject to state licensing. The New Hampshire Supreme Court held that the trial court had correctly rejected the state official's immunity defense:

> "At the time of the defendant's acts, two sources of federal authority had been synthesized and explained with sufficient clarity to provide notice that an individual had a liberty interest cognizable under the fourteenth amendment, and § 1983, in continuing to pursue an occupational calling that he has heretofore exercised, which interest the government and its agents might not extinguish by

such narrow distinctions as those drawn by the Court of Appeals to determine whether a claimed right was "clearly established" for purposes of qualified immunity is inconsistent with *Anderson* and—by threatening to make qualified immunity "virtually plenary" —unreasonably restricts the availability of the *Bivens* remedy.

Had Gilley been aware of *Doe* and *Bartel*, as he is presumed to have been, he could not have failed to appreciate the unlawfulness of his conduct. The notice function intended by *Harlow* was served here.

II. SIEGERT'S CIRCUMSTANTIAL PROOF OF GILLEY'S BAD FAITH WAS SUFFICIENT TO AVOID DISMISSAL OF HIS CLAIM PRIOR TO DISCOVERY.

A. Unconstitutional Motivation May Be Established by Circumstantial Evidence.

This Court has long recognized that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence," *Holland* v. *United States*, 348 U.S. 121, 140 (1954), and in some instances may even be "more certain, satisfying and persuasive than direct evidence." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).[8] On issues involving state of mind, circumstantial evidence may be indispensable because it is so unlikely that direct evidence will be available. *American Communications Ass'n* v. *Douds*,

> the imposition of a stigma or disqualification in the absence of notice and hearing prior to the government's action." 552 A.2d at 94.

[8] *See TSC Industries, Inc.* v. *Northwestern, Inc.*, 426 U.S. 438, 463 n.24 (1976); *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 508 n.17 (1957); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187, 190 (1821).

339 U.S. 382, 411 (1950). *See* Wright, *Federal Practice and Procedure—Criminal 2d* § 411, p. 481 (1982). Recognizing that reality, this Court has held specifically that constitutionally impermissible motivation may be established by circumstantial evidence. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).[9]

Siegert presented far more than "bare allegations of malice." *Harlow*, 457 U.S. at 817. To the contrary, Siegert presented impressive circumstantial evidence that Gilley's motives were malicious and, by extension, unconstitutional. According to his complaint and affidavit, Siegert had received nothing but exemplary job performance ratings between 1979 and 1984, before Gilley became his supervisor. Yet Gilley provided an extremely negative evaluation of Siegert to Col. Smith in his letter of October 23, 1985, which Siegert claimed was filled with false and unsubstantiated allegations about him; and Gilley did so against a background of sharp personal and professional differences between the two men. From these facts, Gilley's malice and unconstitutional motivation could be inferred.

[9] *See also Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2686 (1989) (public figure libel plaintiff alleging that defendant acted with "actual malice" is "entitled to prove the defendant's state of mind through circumstantial evidence"); *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979) (proof of state of mind in libel case may be "in the form of objective circumstances from which the ultimate fact could be inferred"). If a government official suing a private party for libel is allowed to rely on circumstantial evidence to prove the defendant's state of mind, a private party suing a government official in a *Bivens* action should be allowed to rely on such evidence as well.

The Court of Appeals erred in holding that such circumstantial evidence will not support a finding of unconstitutional motivation in a *Bivens* action. Nothing in *Harlow* or its progeny supports that result and this Court should not now establish such an arbitrary and unfair rule. If a government employee has a due process right to a good faith evaluation by his supervisor, as Siegert claims, his ability to vindicate that right through a *Bivens* action should not be made to depend on the form of his evidence. A rule forbidding the use of circumstantial evidence to establish unconstitutional motivation would place serious violations of constitutional rights effectively beyond redress.[10]

[10] In opposing certiorari, Gilley suggested that the extreme approach followed by the Court of Appeals has been embraced by other Courts of Appeals. Opp. 5. However, none of the cases he cited holds that a *Bivens* plaintiff alleging impermissible motivation may not rely on circumstantial evidence, or that a *Bivens* plaintiff relying on such evidence to establish impermissible motivation is not to be allowed discovery prior to summary judgment.

Indeed, the very first opinion cited by Gilley stresses that a *Bivens* plaintiff *should* be able to rely on circumstantial evidence of the defendant's state of mind in resisting summary judgment. *Collinson* v. *Gott*, 895 F.2d 994, 1003 (4th Cir. 1990) (Phillips, J., concurring in the judgment). In that case, moreover, "fairly extensive discovery" was allowed. *Id.* at 997 (per curiam). The other cases cited by Gilley likewise stress that *Bivens* plaintiffs must allege "specific evidence" of improper motive but they do *not* hold that that such evidence cannot be circumstantial. *See, e.g., Pueblo Neighborhood Health Centers* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (discovery allowed prior to summary judgment).

See also, e.g., Melton v. *City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989) (jury could have determined from *Bivens* plaintiff's circumstantial evidence that he had been disciplined for engaging in protected First Amendment activities); *Springer* v. *Seaman*, 821 F.2d 871, 879 (1st Cir.

Indeed, a *Bivens* plaintiff should be permittted to rely on circumstantial evidence to establish unconstitutional motivation even if limited discovery is provided. Although Judge Wald referred to "proof of the defendant's motive" as being "peculiarly in the defendant's hands" (Pet. App. 20a), it is by no means inevitable that any direct proof of unconstitutional motivation will be in the defendant's possession. Unless the defendant admits to having acted with malice ("I did it to ruin him; I didn't care that what I said was false"), any evidence of malice necessarily will be circumstantial. If such evidence is "certain, satisfying and persuasive," *Michalic*, 364 U.S. at 330, then it should be accepted, notwithstanding that it is circumstantial.[11]

B. Limited Discovery Was Justified To Test the Strength of Siegert's Claim.

Given the circumstantial evidence that Siegert presented, the District Court would have been justified in denying Gilley's summary judgment motion based on qualified immunity. The court, however, evi-

---

1987) (*Bivens* plaintiff may rely on circumstantial evidence to meet his burden of demonstrating that defendant's conduct was racially motivated); *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984) (*Bivens* plaintiff may rely on circumstantial evidence to prove conspiracy by defendants).

[11] The Court of Appeals, for its part, apparently would allow claims of unconstitutional motivation only in the most freakish cases, where (a) the defendant in fact has admitted his improper purpose and (b) the plaintiff has become aware of the defendant's admission without the benefit of discovery. *See* Pet. App. 17a-18a (citing *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)). The memorandum containing the critical admission in *Hobson* came to light only as a result of a full-scale Congressional investigation.

dently wanted to test the strength of Siegert's circumstantial case by ordering limited discovery before requiring Gilley to face trial. *See* Pet. App. 31a, 33a, 52a. Its action in this regard surely was permissible; it is supremely ironic that Gilley complains of discovery ordered by the court for his own benefit. The one action the District Court could *not* have taken—and the one action the Court of Appeals has now ordered—was to grant Gilley's motion to dismiss in the teeth of Siegert's "very serious" and "well pleaded" allegations (Pet. App. 50a, 52a), without conducting limited discovery.

Amici are mindful of this Court's teaching that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. The Court has instructed that "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be particularly disruptive of effective government.'" *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817). The policy of *Harlow* is to resolve "insubstantial claims" against government officials prior to discovery and on summary judgment if possible, *Anderson*, 483 U.S. at 640 n.2, and to preclude trial or discovery "in cases where the legal norms the offiicals are alleged to have violated were not clearly established at the time." *Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 817-18).

Conversely, however, if the plaintiff's allegations state a violation of clearly established law, a defendant pleading qualified imunity is not entitled to dismissal before the commencement of discovery. *See Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 817-18). In such a case, this Court has allowed

discovery prior to summary judgment to resolve the question of whether the defendant indeed acted as alleged. *Anderson*, 483 U.S. at 646 n.6.[12]

In ordering limited discovery prior to ruling on Gilley's motion for dismissal or summary judgment, the District Court was faithful to these principles. The court satisfied itself that Siegert's asserted right to a good faith evaluation from his supervisor was clearly established at the time of Gilley's conduct. Pet. App. 39a. The court also satisfied itself that Siegert's claims, far from being 'insubstantial," were "well pleaded" (Pet. App. 52a) and "very serious" (Pet. App. 50a). The court ordered discovery solely to determine whether Siegert's own job record was what he claimed it to be and whether Gilley had acted as alleged. *See* Pet. App. 52a. This was, in short, discovery "tailored specifically to [Gilley's] qualified immunity." *Anderson*, 483 U.S. at 646-47 n.6. And, far from ordering "broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, the court provided that such discovery was to be "sharply circumscribed." Pet. App. 31a.

[12] The Court stated in the pertinent part of the footnote:

"[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation. Thus, on remand it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity." (Citations omitted.)

Gilley contends that *Anderson* is distinguishable because in that case the plaintiff and defendant had presented differing versions of the defendant's conduct, while here "there is no dispute for present purposes that [Gilley] composed and sent the letter; the only disputed question is whether he did so with impermissible intent." Opp. at 8 n.3. But whether Gilley acted with impermissible intent (that is, whether or not he acted as Siegert has alleged) is precisely the kind of question on which discovery was permitted in *Anderson*. The fact that the inquiry here goes to Gilley's state of mind is a consequence of the particular due process right that Siegert claims has been violated.

Gilley further argues: "Nothing in *Anderson* suggests that [Siegert] may pursue discovery simply in the hope of garnering support for his otherwise unsupported belief that the letter was sent in bad faith." Opp. at 8 n.3. But, to repeat, it was not Siegert who requested discovery; the District Court ordered discovery on its own motion. Moreover, Siegert's claim that Gilley acted in bad faith is supported by strong circumstantial evidence; he does not depend on discovery to adduce proof otherwise lacking. The reality is that the District Court ordered limited discovery to give Gilley an opportunity to overcome Siegert's strong circumstantial case. Instead of availing himself of that opportunity, however, Gilley took the position that circumstantial evidence cannot support a finding of unconstitutional motivation in a *Bivens* action.

Finally, Gilley contends that Siegert's position allows a *Bivens* plaintiff "to proceed to discovery and

trial based on conclusory allegations regarding the subjective state of mind," thereby circumventing *Harlow* and negating the basic purposes of qualified immunity. Opp. at 8 n.3. This contention, too, is misconceived. As discussed, Siegert's allegations were not conclusory but were supported by strong circumstantial evidence. And Siegert was entitled to discovery not because he had alleged, superfluously, that Gilley had acted in bad faith, but because Gilley's state of mind was an essential element of the claimed constitutional violation. Siegert's ability to proceed to trial depends on whether his claim that Gilley had acted in bad faith survives the discovery ordered by the District Court.

Gilley's real quarrel seems to be with the proposition that a defendant's intent (unrelated to knowledge of the law) may ever be an essential element of a plaintiff's claim in a *Bivens* action. Unable to argue that such claims should be barred in *Bivens* actions outright, Gilley attempts to block such claims by proposing procedural roadblocks that few plaintiffs could ever surmount—an arbitrary rule against circumstantial evidence to prove impermissible motivation, and a rule flatly precluding discovery when direct evidence of impermissible motivation has not been alleged. These devices undoubtedly would spare government officials from lawsuits; but in many cases they also would close off " 'the only realistic avenue for vindication of constitutional guarantees.' " *Anderson*, 483 U.S. at 638 (quoting *Harlow*, 457 U.S. at 814).

CONCLUSION

The judgment below should be reversed and the limited discovery ordered by the District Court should be allowed to proceed.

Respectfully submitted.

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

ARTHUR B. SPITZER
ACLU FUND OF THE NATIONAL CAPITAL AREA
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DAVID H. REMES
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5212

DAVID RUDOVSKY
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-3087

Counsel for Amici Curiae

November 29, 1990